North Carolina Department of Health and Human Services
Division of Mental Health, Developmental Disabilities and Substance Abuse Services
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Michael F. Easley, Governor
Carmen Hooker Odom, Secretary

Michael Moseley, Director

May 12, 2004

MEMORANDUM

TO: Area MH/DD/SA Authority Directors

FROM: Phillip Hoffman, Resource & Regulatory Management Section Chief

RE: Referral and Client Recruitment Practices

The Division of Mental Health, Developmental Disabilities and Substance Abuse Services has been made aware of some questionable practices concerning the recruitment and solicitation of consumers by providers of MH/DD/SA services funded by Medicaid. DMH/DD/SAS has sought and received advice and counsel from the Medicaid Fraud unit of the NC Department of Justice. The purpose of this memorandum is to make you aware of the possible violations of Medicaid anti-kickback laws with these practices. The letter, which was sent to the Accountability Team, is attached to this memo.

In each of these cases, the response we received was that they were possibly in violation of one or several applicable laws, and that each real case would need to be examined on its own merits to determine specifically what laws, if any, were violated by the practice.

We felt these practices, and similar ones about which we continue to be informed, should be brought to your attention as you engage in your work with providers of services throughout the State.

Should you be aware of such practices as these, or similar ones which bring questions to you, please feel free to contact the Accountability Team. In order for us to make referrals to the Medicaid Fraud unit for their investigation, we will need something beyond rumors or hearsay, but rather a credible witness to the practice. The Accountability Team will undertake a review of the allegation, and refer the matter if the facts so warrant.

You may wish also to request guidance from area authority counsel to gain a better perspective on the laws that were cited and are attached with the communication from the Medicaid Fraud unit of the Department of Justice.

Please feel free to contact Jim Jarrard of the Accountability Team regarding these matters. He can be reached by phone at 919-881-2446 or by e-mail at Jim.Jarrard@ncmail.net. Thank you for your continuing commitment to persons served through the MH/DD/SA system in North Carolina.

PH/jj

Attachment

cc: Carmen Hooker Odom
Lanier Cansler
James Bernstein
DMH/DD/SAS Executive Leadership Team
Carol Duncan Clayton
Robin Huffman
Mike Mayer
Patrice Roesler
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Rich Slipsky, DOJ
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ROY COOPER
ATTORNEY GENERAL

State of North Carolina
Department of Justice
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RALEIGH
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Reply to:
CHARLES C. BROD
Medicaid Investigations Unit
3824 Barrett Drive, Suite 200
Raleigh, North Carolina 27609
Telephone: (919) 881-2320
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May 5, 2004

Mr. James Jarrard
Accountability Section
DMH-DD-SAS
3824 Barrett Drive
Raleigh, North Carolina 27609

Dear Mr. Jarrard:

The Program Accountability Section of the Division of Mental Health (DMH) has requested advice in reference to providers of MH/DD/SA services to Medicaid recipients regarding the four situations set forth below. Please note that the following advice is not a formal opinion of the Attorney General's Office but is given for the purpose of providing guidance as to which situations should be referred for investigation and to which agency the situations should be referred. The revelation of additional facts could significantly change the advice provided herein.

Situation #1:

Provider A is going to provider B's employees and telling them they will pay the employee more per hour if they work for them and bring the client with them.

Response

This situation may be a criminal violation of the federal anti-kickback statute, 42 U.S.C. §1320a-7b(b) (copy enclosed) and may subject the provider to civil monetary penalties under 42 U.S.C. §1320a-7a(a)(7) (copy enclosed). In general, the anti-kickback statute prohibits knowingly and willfully offering or receiving anything of value to induce the referral of patients whose services are paid for by a federal health care program (Medicaid and Medicare).

However, the anti-kickback statute includes numerous exceptions, which are referred to as "safe harbors." One of the safe harbors, which is found in the statute at §1320a-7b(b)(3)(B) and also in the rule, 42 C.F.R. §1001.952 (copy enclosed), states that the anti-kickback statute is not violated by payments from an employer to an employee. Therefore, if provider A pays provider

B's employees for referrals while they are still employed by provider B, then provider A and the employees may be in violation of the anti-kickback statute. However, if provider A pays the employees after they come to work for provider A, then the safe harbor for employee payments may apply and, if so, there would not be a violation. There is nothing wrong with provider A offering a higher salary to its employees, and the employees cannot be expected to erase the information from their minds. (Whether the employee violated any contractual agreement to not compete is not within the scope of this discussion.) Also, if the evidence shows that the reason for the job offer was the provider's desire to obtain the skills of the employee rather than a desire to obtain client information, the provider may not have intended to violate the anti-kickback statute.

If the Accountability Section is concerned that the federal anti-kickback statute may have been violated, it can refer this type of situation to the Office of Inspector General (OIG), United States Department of Health and Human Services (HSS) for further advice. Contact information for OIG can be found at http://oig.hhs.gov. If OIG determines that there is a violation, then OIG can refer the matter to the appropriate law enforcement agency. If a provider is in doubt as to whether its actions are legal, the provider can ask OIG for an advisory opinion.

This situation may also be a violation of the Health Insurance Portability and Accountability Act (HIPAA), "Standards for Privacy of Individually Identifiable Health Information," set forth in 45 C.F.R. – Parts 160 and 164, which prohibits the disclosure of health information in certain situations. Violators are subject to being charged with a criminal offense, 42 U.S.C. §1320d-6 (copy enclosed), and the imposition of a civil penalty, 42 U.S.C. §1320d-5 (copy enclosed). If the employee discloses health information about provider B's clients to provider A while still employed by provider B, then the employee may be in violation of HIPAA. However, under HIPAA clients are free to disclose and to consent to the disclosure of their health information. Therefore, if the clients make the disclosures themselves or consent to the disclosures, then there is no violation. Complaints of HIPAA violations may be filed with the Secretary of HHS, Office for Civil Rights (OCR), http://www.hhs.gov/ocr. If OCR determines that there is a violation, then OCR can refer the complaint to the appropriate law enforcement agency.

Situation # 2:

Provider is offering clients "bonus" services if they will sign with the provider (i.e., sign with me for 50 hours of personal care and we will give you five for free). The additional hours are not charged to the Medicaid program.

Response

This situation may be a violation of the federal anti-kickback statute. The August 4, 1995 Special Fraud Alert issued by OIG, which can be found at http://oig.hhs.gov/fraud/docs/alertsandbulletins/081095.html, states that kickbacks by home health providers have included, "Offering free services to beneficiaries, including transportation and meals, if they agree to switch home health providers." The Special Fraud Alert refers to offering services to "switch" providers. OIG may need to clarify whether this also applies to an offer of free services made at the time of the client's initial decision to use a certain provider and not just to a later offer to encourage a client to switch from an existing provider. The Accountability Section can refer concerns regarding these situations to OIG. If OIG determines that there is a violation, it

can refer the matter to the appropriate law enforcement agency. If a provider is in doubt as to whether its actions are legal, the provider can ask OIG for an advisory opinion.

This situation may also subject the provider to civil monetary penalties under 42 U.S.C. § 1320a-7a(a)(5) (copy enclosed). Paraphrasing this statute, it states that any provider that offers something of value to a Medicaid recipient knowing that the recipient is likely to be influenced to order services paid for by Medicaid from the provider is subject to a civil penalty of $10,000 for each service and is subject to being excluded from participating in the Medicaid program. The Accountability Section can refer these situations to the Office of Counsel of the Office of Inspector General, HHS. The Office of Counsel can determine whether it wants to pursue an action for civil penalties. Information regarding contacting the Office of Counsel can be found at http://directory.psc.gov/os/893.html.

Please note that the above advice is based on the assumption that the provider did not bill Medicaid for the bonus services. Billing Medicaid for medically unnecessary services would be a violation of Federal and State provider fraud statutes.

Situation # 3:

Provider puts an advertisement in the newspaper soliciting client referrals from anybody, and promising a referral fee.

Response

This situation may violate the federal anti-kickback statute and subject the provider to civil monetary penalties as noted above. The status of the person responding to the advertisement may affect whether there is a violation. Anti-kickback prosecutions generally involve one provider or employee of a provider making referrals to another provider. I have found no prosecutions involving referrals by patients or their family members except where the services were unnecessary. The civil monetary penalties statute does not apply to clients. The Accountability Section can refer complaints regarding these situations to OIG. If OIG determines that there is a violation, it can refer the matter to the appropriate law enforcement agency. If a provider is in doubt as to whether its actions are legal, the provider can ask OIG for an advisory opinion.

Situation # 4:

Providers are giving referral fees to case managers for referrals to their agencies.

Response

This situation is a violation of the federal anti-kickback and civil monetary penalty statutes referred to above. Of all four situations, this is the clearest and most serious violation. Both the provider giving the referral fee and the case manager accepting the referral fee would be violating these statutes. The Accountability Section should refer this type of situation to the North Carolina Medicaid Investigations Unit (MIU) if the situation involves a Medicaid provider and to the Office of Inspector General, Criminal Investigations Division, if it involves a Medicare provider. Before making a referral there should be some credible evidence of an anti-kickback violation, not mere

hearsay or rumors. DMH investigators should have a statement from a witness who has personal knowledge of the facts. However, it is not necessary for DMH investigators to have completed an in depth investigation prior to referral. It can be determined on a case-by-case basis how much investigative work the DMH investigators need to do before making a referral. This can be accomplished by contacting the Deputy Director of the Medicaid Investigations Unit at 919-881-2320 and discussing the merits of the particular investigation with him.

With best regards, I am

Sincerely yours,

Charles H. Hobgood

Charles H. Hobgood
Assistant Attorney General

Enclosures

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 7. SOCIAL SECURITY ACT
TITLE XI. GENERAL PROVISIONS, PEER REVIEW, AND ADMINISTRATIVE SIMPLIFICATION
PART A. GENERAL PROVISIONS

42 USCS § 1320a-7b (2003)

§ 1320a-7b. Criminal penalties for acts involving Federal health care programs

(a) . . . .

(b) Illegal remunerations.

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind--

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $ 25,000 or imprisoned for not more than five years, or both.

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $ 25,000 or imprisoned for not more than five years, or both.

(3) Paragraphs (1) and (2) shall not apply to—

(A) a discount or other reduction in price obtained by a provider of services or other entity under a Federal health care program if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under a Federal health care program;

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services;

(C) any amount paid by a vendor of goods or services to a person authorized to act as a purchasing agent for a group of individuals or entities who are furnishing services reimbursed under a Federal health care program if--

(i) the person has a written contract, with each such individual or entity, which specifies the amount to be paid the person, which amount may be a fixed amount or a fixed percentage of the value of the purchases made by each such individual or entity under the contract, and

(ii) in the case of an entity that is a provider of services (as defined in section 1861(u) [*42 USCS § 1395x*(w)]), the person discloses (in such form and manner as the Secretary requires) to the entity and, upon request, to the Secretary the amount received from each such vendor with respect to purchases made by or on behalf of the entity;

(D) a waiver of any coinsurance under part B of title XVIII [*42 USCS § § 1395j* et seq.] by Federally qualified health care center with respect to an individual who qualifies for subsidized services under a provision of the Public Health Service Act;

(E) any payment practice specified by the Secretary in regulations promulgated pursuant to section 14(a) of the Medicare and Medicaid Patient and Program Protection Act of 1987 [note to this section];

(F) any remuneration between an organization and an individual or entity providing items or services, or a combination thereof, pursuant to a written agreement between the organization and the individual or entity if the organization is an eligible organization under section 1876 [*42 USCS § 1395mm]* or if the written agreement, through a risk-sharing arrangement, places the individual or entity at substantial financial risk for the cost or utilization of the items or services, or a combination thereof, which the individual or entity is obligated to provide;

(G) the waiver or reduction by pharmacies (including pharmacies of the Indian Health Service, Indian tribes, tribal organizations, and urban Indian organizations) of any cost-sharing imposed under part D of title XVIII [*42 USCS § § 1395w*-101 et seq.], if the conditions described in clauses (i) through (iii) of section 1128A(i)(6)(A) [*42 USCS § 1320a-7a*(i)(6)(A)] are met with respect to the waiver or reduction (except that, in the case of such a waiver or reduction on behalf of a subsidy eligible individual (as defined in section 1860D-14(a)(3) [*42 USCS § 1395w*-114(a)(3)]), section 1128A(i)(6)(A) [*42 USCS § 1320a-7a*(i)(6)(A)] shall be applied without regard to clauses (ii) and (iii) of that section); [and]

(H) [Caution: This subparagraph applies to services provided, and contract years beginning, on or after January 1, 2006, as provided by § 237(e) of Act Dec. 8, 2003, P.L. 108-173, which appears as *42 USCS § 1320a-7b* note.] any remuneration between a federally qualified health center (or an entity controlled by such a health center) and an MA organization pursuant to a written agreement described in section 1853(a)(4) [*42 USCS § 1395w-23*(a)(4)]. [; and]

[(I)](H) any remuneration between a health center entity described under clause (i) or (ii) of section 1905(l)(2)(B) [*42 USCS § 1396d*(l)(2)(B)] and any individual or entity providing goods, items, services, donations, loans, or a combination thereof, to such health center entity pursuant to a contract, lease, grant, loan, or other agreement, if such agreement contributes to the ability of the health center entity to maintain or increase the availability, or enhance the quality, of services provided to a medically underserved population served by the health center entity.

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 7. SOCIAL SECURITY ACT
TITLE XI. GENERAL PROVISIONS, PEER REVIEW, AND ADMINISTRATIVE SIMPLIFICATION
PART A. GENERAL PROVISIONS

42 USCS § 1320a-7a (2003)

§ 1320a-7a. Civil monetary penalties

(a) Improperly filed claims. Any person (including an organization, agency, or other entity, but excluding a beneficiary, as defined in subsection (i)(5)) that--

(1) . . . .

(5) offers to or transfers remuneration to any individual eligible for benefits under title XVIII of this Act [*42 USCS § § 1395* et seq.], or under a State health care program (as defined in section 1128(h) [*42 USCS § 1320a-7*(h)]) that such person knows or should know is likely to influence such individual to order or receive from a particular provider, practitioner, or supplier any item or service for which payment may be made, in whole or in part, under title XVIII [*42 USCS § § 1395* et seq.], or a State health care program (as so defined);

. . . .

(7) commits an act described in paragraph (1) or (2) of section 1128B(b) [*42 USCS § 1320a-7b*(b)];

shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of not more than $ 10,000 for each item or service (or, in cases under paragraph (3), $ 15,000 for each individual with respect to whom false or misleading information was given; in cases under paragraph (4), $ 10,000 for each day the prohibited relationship occurs; or in cases under paragraph (7), $ 50,000 for each such act). In addition, such a person shall be subject to an assessment of not more than 3 times the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such claim (or, in cases under paragraph (7), damages of not more than 3 times the total amount of remuneration offered, paid, solicited, or received, without regard to whether a portion of such remuneration was offered, paid, solicited, or received for a lawful purpose). In addition the Secretary may make a determination in the same proceeding to exclude the person from participation in the Federal health care programs (as defined in section 1128B(f)(1) [*42 USCS § 1320a-7b*(f)(1)]) and to direct the appropriate State agency to exclude the person from participation in any State health care program.

. . . .

TITLE 42 -- PUBLIC HEALTH
CHAPTER V -- OFFICE OF INSPECTOR GENERAL -- HEALTH CARE, DEPARTMENT OF HEALTH AND HUMAN SERVICES
SUBCHAPTER B -- OIG AUTHORITIES
PART 1001 -- PROGRAM INTEGRITY -- MEDICARE AND STATE HEALTH CARE PROGRAMS
SUBPART C -- PERMISSIVE EXCLUSIONS

42 CFR 1001.952

§ 1001.952 Exceptions.

The following payment practices shall not be treated as a criminal offense under section 1128B of the Act and shall not serve as the basis for an exclusion:

(a) . . . .

(i) Employees. As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs. For purposes of paragraph (i) of this section, the term employee has the same meaning as it does for purposes of 26 U.S.C. 3121(d)(2).

. . . .

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 7. SOCIAL SECURITY ACT
TITLE XI. GENERAL PROVISIONS, PEER REVIEW, AND ADMINISTRATIVE SIMPLIFICATION
PART C. ADMINISTRATIVE SIMPLIFICATION

42 USCS § 1320d-6 (2003)

§ 1320d-6. Wrongful disclosure of individually identifiable health information

(a) Offense. A person who knowingly and in violation of this part [*42 USCS § § 1320d* et seq.]--
(1) uses or causes to be used a unique health identifier;
(2) obtains individually identifiable health information relating to an individual; or
(3) discloses individually identifiable health information to another person,

shall be punished as provided in subsection (b).

(b) Penalties. A person described in subsection (a) shall--
(1) be fined not more than $ 50,000, imprisoned not more than 1 year, or both;
(2) if the offense is committed under false pretenses, be fined not more than $ 100,000, imprisoned not more than 5 years, or both; and
(3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than $ 250,000, imprisoned not more than 10 years, or both.

§ 1320d-5. General penalty for failure to comply with requirements and standards

(a) General penalty.

(1) In general. Except as provided in subsection (b), the Secretary shall impose on any person who violates a provision of this part [*42 USCS § § 1320d* et seq.] a penalty of not more than $ 100 for each such violation, except that the total amount imposed on the person for all violations of an identical requirement or prohibition during a calendar year may not exceed $ 25,000.

(2) Procedures. The provisions of section 1128A [*42 USCS § 1320a-7a]* (other than subsections (a) and (b) and the second sentence of subsection (f)) shall apply to the imposition of a civil money penalty under this subsection in the same manner as such provisions apply to the imposition of a penalty under such section 1128A.

(b) Limitations.

(1) Offenses otherwise punishable. A penalty may not be imposed under subsection (a) with respect to an act if the act constitutes an offense punishable under section 1177 [*42 USCS § 1320d-6].*

(2) Noncompliance not discovered. A penalty may not be imposed under subsection (a) with respect to a provision of this part [*42 USCS § § 1320d* et seq.] if it is established to the satisfaction of the Secretary that the person liable for the penalty did not know, and by exercising reasonable diligence would not have known, that such person violated the provision.

(3) Failures due to reasonable cause.

(A) In general. Except as provided in subparagraph (B), a penalty may not be imposed under subsection (a) if--

(i) the failure to comply was due to reasonable cause and not to willful neglect; and

(ii) the failure to comply is corrected during the 30-day period beginning on the first date the person liable for the penalty knew, or by exercising reasonable diligence would have known, that the failure to comply occurred.

(B) Extension of period.

(i) No penalty. The period referred to in subparagraph (A)(ii) may be extended as determined appropriate by the Secretary based on the nature and extent of the failure to comply.

(ii) Assistance. If the Secretary determines that a person failed to comply because the person was unable to comply, the Secretary may provide technical assistance to the person during the period described in subparagraph (A)(ii). Such assistance shall be provided in any manner determined appropriate by the Secretary.

(4) Reduction. In the case of a failure to comply which is due to reasonable cause and not to willful neglect, any penalty under subsection (a) that is not entirely waived under paragraph (3) may be waived to the extent that the payment of such penalty would be excessive relative to the compliance failure involved.